

**Before the
Federal Communications Commission
Washington, D.C. 20554**

EarthLink, Inc.,)	
)	
Complainant,)	
)	
v.)	File No. EB-04-MD-006
)	
SBC Communications, Inc.,)	
SBC Advanced Solutions, Inc.,)	
)	
Defendants.)	

ORDER

Adopted: September 14, 2004

Released: September 14, 2004

By the Chief, Enforcement Bureau:

1. This Order denies Defendants' Request for Stay¹ of part of an interlocutory discovery order that the Market Disputes Resolution Division issued on August 25, 2004.² In particular, defendants SBC Communications, Inc. and SBC Advanced Solutions, Inc. (collectively, "SBC") object to the *Discovery Order* to the extent it requires production of cost data relating to SBC's internet service provider affiliates (known collectively as "SBCIS"). We find the *Request for Stay* to be unpersuasive.³

¹ Defendants' Request for Stay, File No. EB-04-MD-006 (filed Aug. 31, 2004) ("*Request for Stay*"). Complainant EarthLink, Inc. opposes the *Request for Stay*. See EarthLink Opposition to SBC Stay Request, File No. EB-04-MD-006 (filed Sept. 7, 2004). ("*EarthLink's Opposition*"). Section 1.727(f) of the Commission's rules states that "[n]o reply may be filed to an opposition to a motion." 47 C.F.R. § 1.727(f). On September 13, 2004, SBC filed a reply to *EarthLink's Opposition*. See Defendants' Reply in Support of Request for Stay ("*SBC's Reply*"). *SBC's Reply*, accordingly, is an unauthorized pleading, which we hereby strike. Nevertheless, even were we to consider *SBC's Reply*, we find nothing in it that would change our determination (explained below) that SBC has failed to satisfy the criteria for obtaining a stay.

² Order, File No. EB-04-MD-006 (rel. Aug. 25, 2004) ("*Discovery Order*"). In addition to the *Request for Stay*, SBC simultaneously filed an Application for Review of the *Discovery Order*. See Defendants' Application for Review, File No. EB-04-MD-006 (filed Aug. 31, 2004) ("*Application for Review*"). Consistent with long-standing policy, the Commission will address the *Application for Review* in conjunction with its ruling on the merits of the claims raised in this proceeding. See *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Order on Reconsideration, 16 FCC Rcd 5681, 5697-98, ¶ 38 (2001).

³ Given our denial of the *Request for Stay*, the discovery/briefing schedule contained in Part IV of the *Discovery Order* remains in place.

2. SBC argues that a stay is warranted under the guidelines set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, which include (1) whether the party seeking a stay has made a strong showing that it is likely to prevail on the merits; (2) whether, without a stay, the requesting party would be irreparably harmed; (3) whether issuance of a stay substantially would harm other parties to the proceeding; and (4) whether a stay is in the public interest.⁴ Having carefully reviewed the argument proffered by SBC in light of *Virginia Petroleum Jobbers*, we decline to enter a stay.⁵ Specifically, SBC's allegations of irreparable harm are largely speculative⁶ and entirely unsupported.⁷ This type of harm is insufficient to warrant a stay request.⁸ Moreover, SBC has not shown that the *mere production* of the ordered information (subject to the Commission's confidentiality rules) – as opposed to an adverse ruling on the merits of the case – will result in the purported harm it has identified.⁹

3. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and sections 0.111, 0.311, and 1.727 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, 1.727, that Defendants' Request for Stay is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

⁴ *Request for Stay* at 2 (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (“*Virginia Petroleum Jobbers*”)).

⁵ We believe that analysis of the “irreparable harm” element disposes of the *Request for Stay*. Nonetheless, we note that SBC similarly has not made a compelling showing with respect to the other three *Virginia Petroleum Jobbers* factors.

⁶ See *Request for Stay* at 3 (the *Discovery Order* “will likely cause [SBCIS] to lose existing subscribers” and “threatens to restrain SBCIS’s ability to compete freely in the provision of broadband Internet access services”) (emphasis added); 4 (“cable companies and other competitors could seize the opportunity to implement targeted price reductions of their own in an effort to win subscribers from SBCIS”) (emphasis added).

⁷ Contrary to section 1.727 of the Commission's rules, the *Request for Stay* contains only *unsupported* factual assertions. 47 C.F.R. § 1.727(b) (“All facts relied upon in motions must be supported by documentation or affidavits . . .”).

⁸ See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (injunctive relief “will not be granted against something merely feared as liable to occur at some indefinite time”; rather, the party seeking a stay must show that “[t]he injury complained of [is] of such imminence that there is a ‘clear and present’ need for equitable relief to prevent irreparable harm”) (citing *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) and *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff’d*, 548 F.2d 977 (D.C. Cir. 1976)); *id.* (“Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.”).

⁹ See *Wisconsin Gas v. FERC*, 758 F.2d at 674 (a party seeking a stay “must show that the alleged harm will directly result from the action which the movant seeks to enjoin”).